Supreme Court of the United States

October Term, 1968

In the Matter of:

FORTNER ENTERPRISES, INC.,

Petitioner.

vs

UNITED STATES STEEL CORPORATION
U.S. STEEL HOMES CREDIT CORPORATION,

Respondents.

Docket No. 306

Place Washington, D. C.

Date January 23, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

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Washington, D. C.
Thursday, January 23, 1969

The above-entitled matter came on for argument at 11:15 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

KENNETH L. ANDERSON, Esq.
1805 Kentucky Home Life Building
Louisville, Kentucky
Counsel for Petitioners

MacDONALD FLINN, Esq.
14 Wall Street
New York, New York
Counsel for Respondents

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PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 306, Fortner Enterprises, Inc., Petitioner, versus United States Steel Corporation.

Mr. Anderson, you may proceed, if you like.

ORAL ARGUMENT OF KENNETH L. ANDERSON, ESQ.

ON BEHALF OF PETITIONERS

MR. ANDERSON: Thank you, Your Honor. May it please the Court.

This is an anti-trust suit filed by me in the Federal District for the western district of Kentucky in 1962 charging the respondents, United States Steel Corporation and its wholly owned subsidiary, U. S. Steel Homes Credit Corporation, with conspiring to violate Sections 1 and 2 of the Sherman Act.

The background of the case is that in December of 1959 Mr. A. B. Fortner of Louisville, Kentucky had an interest in a number of corporations and he had been involved in the real estate business, the real estate development business, since approximately 1939.

In the period immediately prior to this December 1959 time, Mr. Fortner and one of his business associates and another corporation had commenced development of a subdivision in the Louisville, Kentucky and Jefferson County area.

They had, in fact, prior to December of 1959, built 250 conventional homes in this subdivision which was called

Golden Meadows Subdivision.

In December of 1959 Mr. Fortner was approached by representatives of the United States Steel Corporation and their Homes Division which manufactures prefabricated homes. These are house packages that they deliver on a tractor-trailer van and the builder has people there to erect the homes.

Now, when these people approached Mr. Fortner, they approached him on the premise that there were substantial financing benefits to be derived from this second conspirator, whom we charge here in this case, what I call the Credit Corporation.

This was a financing subsidiary and its purpose was, at the beginning, to aid the dealer-builders of the Homes Division of U. S. Steel.

As we indicate in our brief, this purpose got extended in 1958 just before they started talking to Mr. Fortner and they decided that they were going to use the financing,as their own people have described it, as a tool to obtain sales of these prefabricated homes.

So, Mr. Fortner had numerous discussions with these people and financing offers, I believe, in construing the evidence, of course, where we are basically talking about whether a summary judgment should have been given against us, that the evidence should have been construed most favorably to our side and not the other side, and I think that the

inference most reasonably to be drawn from this record is that these financing offers, according to Mr. Fortner's affidavit, kept getting better and better to the point that they offered Mr. Fortner 100 percent money to buy the land and develop the land that had not been developed that was left in the remainder of this subdivision.

They also were going to provide the construction money, all at a six percent interest in one-half points.

Now, there are substantial differences between this financing of 100 percent at six percent and one-half point and other financing available, I believe, generally, throughout the eastern portion of the United States and certainly in the lower Kentucky area during this time to dealer-builders or to builders.

The conventional development and land purchase loan as their own documents show was a 60 percent loan, not 100 percent. The other manufacturers, who were supposedly in this financing business also, were offering six percent interest, but 10 points.

So that when this offer came to Mr. Fortner, this was an exceedingly attractive proposition to him.

Q I am essentially ignorant in this general field of financing, so that I don't quite understand what six percent interest, but 10 points is.

A The six percent interest would be six percent

per year throughout the term of the loan. The 10 points would be 10 percent of the gross amount of the loan.

Q Give me an example.

A When the loan proceeds are distributed that 10 percent is deducted from the amount that is distributed to the person receiving the loan.

Q The borrower.

A Yes, sir, the borrower.

Q Let's say the borrower borrows $1 million.

A Right. He gets $900,000.

Q He gets $900,000 and he pays six percent interest on a million?

A On a million.

Q On a million?

A Right, and has ---

Q And what happens to that difference of $100,000?

A Well, it is, in effect, if the Court please, a form of usery, which is condoned, unfortunately, by the Courts.

Q The borrower never gets that?

A No, sir. That is why one-half of a percent and 10 percent -- there is so much difference.

Q Well, I can see that.

A This is ---

Q It purports to be a $1 million loan. You pay

six percent on $1 million, but actually all a borrower ever gets is $900,000?

A Right.

Q Even though -- I mean, it is not any sort of an escrow proposition?

A No, sir.

Q Or a conditional thing; he just never gets that last $100,000.

A He never gets it.

As Mr. Flinn points out in his own brief, that it is taken off the top.

Q Okay.

A So that this was substantially an attractive proposition to this man who is in business and he has a corporation in existence which is called Fortner Enterprises, Inc. That corporation had been in existence for some time. It, as other businessmen do, has corporations available from time to time.

The land that was to be the subject matter of this arrangement was available in another corporation. So that when it got to the point of this transaction being consummated this corporation then had sold to it by the other corporation the land on which they were going to build these homes.

Now, these people started out talking to Mr. Fortner about homes, and the whole idea of this thing was that you

have got our homes if you are going to borrow this money on these favorable terms.

So, they prepared three sets of documents, a loan agreement, a mortgage and a set of notes. The loan agreement is the key document here because that loan agreement specifically provides that on each lot in the subdivision which is the subject matter of these loans that there will be erected a prefabricated house manufactured by the United States Steel and its Homes Division.

Now, this loan agreement, itself, was an agreement between the Credit Corporation and Fortner Enterprises, Inc. United States Steel is not a party to this agreement. They were a third party, obviously, beneficiary of the agreement.

The loan agreement goes on to provide that,if the borrower, Mr. Fortner and his corporation, doesn't do various things, like pay on the notes and so forth, including, if the borrower shall otherwise fail to comply with the terms of this agreement, or with the terms and provisions of the notes or mortgage, then in any such event,at the option of the lender, all obligation on its part to make further advances on account of the loan shall cease and the lender may enter into possession of the premises and perform any and all work and labor necessary to complete said improvements and direct said dwelling houses.

The said dwelling houses that they are referring to

are the U. S. Steel Homes prefabricated houses.

So, they entered into this transaction. Mr. Fortner has stated in his affidavit, which is in this record, that he would not have purchased these homes but for the unique character -- the attractive, to him as a consumer and businessman -- character of the loans that were offered.

He started his project. The record shows quite clearly that they spent large sums of money on advertising, that they did all the things necessary to get the project going in a proper manner, that there were delays in deliveries, that there were problems.

A second loan was made and at the time that the second loan was consummated to cover some additional lots in the subdivision that became available, there had been closings according the the record.

Then, after this loan was consummated, which did get some additional capital into the corporation, things really began to happen. This is where we get the damage to Fortner Enterprises because the houses, as they were occupied, began to reveal substantial defects.

They couldn't get along and the reputation of the subdivision started going bad. Mr. Fortner's salesmen started not wanting to come out and sell the houses because of the way the walls and the tops that would swell up. So, Mr. Fortner called these people and said, "Look, I will meet

every term of this loan agreement, our people will pay off this loan agreement, the money that you loaned us, but please relieve us of the restrictive provision in the contract. Let us build conventional homes."

This was refused. This was in December of 1961 or January of 1962. Matters kept getting worse. So, Mr. Hamilton wrote the Homes Division a letter saying we just can't live with this thing. So they had a meeting, and at the meeting they again, I guess you would say, formally asked the Credit Corporation representatives there, "Let us out of this so we can pay you off. We are ready, willing and able to pay you off in accordance with the terms of this agreement if you will relieve us of this tie-in arrangement in this loan agreement."

They were again refused and told that they were going to insist that they fulfill every term of the loan agreement. It was impossible to build these homes and this anti-trust suit was filed.

This suit was filed charging, of course, violation of Section 1, on the basis of the conspiracy to create the tie-in, the tie-in, itself, and on the basis of the conspiracy to monopolize.between these two corporations under Section 2 of the Sherman Act.

The evidence is that,in 1960, 68 percent of all the sales of the Homes Division involved loan agreements with this tpye of tie-in provision in it.

In 1961 it was 70 percent. In 1962 it was 75 percent. Of the 43 people whose names are listed in the record to whom loans were made in excess of $250,000 by the Credit Corporation, 29 of those fell under, what they call, their special financing program, which is this program where they go beyond conventional means and use whatever really means are necessary to capture a purchaser for these products, mainly this junk that they call prefabricated houses.

Q I can't quite see the theory of the conspiracy to monopolize, to monopolize what, housing and the building of new ---

A Prefabricated house market, yes, sir. This is not a charge of monopolization, but a charge of conspiracy to monopolize, which I view in terms of their own record showing that the purpose of this program was to obtain for them a larger share of the market in the prefabricated home field.

Q Well, now, that is something short of conspiracy to monopolize. Every businessman is always, on his own or in cooperation with others, trying to do better, trying to obtain a larger share of the business.

A Yes, sir, and there are proper ways to do it and improper ways to do it.

Q What is the theory of the conspiracy to monopolize? My question is to monopolize what -- new housing building in Louisville, in the Louisville market area or ---

A Well, I regarded it, Your Honor, as their whole market area, because the evidence is that this was the tool that they were using in their whole market area to obtain sales of this product.

My point, in this summary judgment procedure, is that I had enough evidence in the record to, at least, create a question of fact for trial. This is what really this case is all about. I am here being kicked out of Court on a motion for summary judgment filed 11 days before trial after I had had considerable discovery over the years with my client, Mr. Fortner's deposition, for example, had never been taken.

So, that when I, in the process of getting ready for trial, am confronted 11 days before trial with this motion for summary judgment, prepared affidavits of Mr. Fortner and of Mr. Horn, which affidavits I felt clearly established, at least,questions of fact to be decided by a jury.

So, I am knocked out on my ear. That is why I am here. I think I am entitled to a trial. My position all along in this matter and partly as a tactical proposition has been that the evidence uncontradicted evidence in the record fulfills the elements of an illegal tie-in agreement, that we have the necessary economic force present under existing case law on tie-ins to establish the requisite economic power of the respondents over the tie-in element.

We have the necessary, not insubstantial, amount of

interstate commerce in the tie-in element, ie., the prefabricated houses, and we have admitted, it has never been denied that the time itself exists.

Q These are Section 1 cases, aren't they?

A Yes, sir.

Q They are not monopoly?

A That is correct, sir.

Obviously, I feel, that the best thrust of my case is the Section 1 violation.

Q Well, under the Section 1 violation, what additional evidence would you have that is not in this record already on your tie-in point?

A Well, I am sure that Mr. Flinn, in his brief, has apparently completely changed the respondents' approach to this matter and is now, I feel, more directly meeting the issues that are involved.

It reads in his brief what he is doing and that is raising a factual question as to the economic power available as to the tie-in element in this case. He is arguing innuendo and questioning the capabilities of our witnesses, whose affidavits are in the record in an attempt, I feel, to cast some question on our evidence on this Court.

I had other witnesses who would collaborate the point of the uniqueness. This is not in the record, I mean this is my statement to the Court. I had other witnesses who

would testify on this element and ---

Q What element?

A The element, Your Honor, that financing on the terms that were offered to Fortner Enterprises was not available at least in our Louisville, Kentucky area from any other source.

Q You say they forced you to buy a tie-in.

A Yes, sir. They forced us to buy the prefabricated houses.

Q Forced you to buy the prefabricated houses in order to get the loan?

A In order to get the loan, yes, sir.

Q And that is the argument you have?

A Yes, sir. In order to get the loan which was of a particularly appealing nature to this businessman which was unique in its properties in that it was not the conventional type loan, shall we say.

Q I wonder if the issue before us can be stated this way: I suppose incontestably there are other sources available for funds by way of loan in the area. There were other sources available from which you could obtain loans.

According to the opinion of the court below there were a great many such sources, but your point is that it was only from the defendant here, the U. S. Steel's lending corporation or financial corporation or whatever it is, that

Fortner Enterprises could obtain loans on terms and conditions that were economically possible for the company.

A Yes, sir.

Q So that the narrow issue we have is whether the requirement in our Northern Pacific,and other tie-in cases of an appreciable effect on the market, whether the tie-in has an appreciable effect on the market or ties up the requisite portion of the market is satisfied by that kind of a showing, satisfied so clearly and completely as to justify a summary judgment against you.

Is that about the issue before us?

A Well, everything is correct, Your Honor, except the question of whether -- I think it is the converse really. The summary judgment was against me, not for me.

Q I know that, yes. I tried to say that, as to justify the entry of summary judgment, we are sitting as an appellate court and the question is whether the lower court did or did not err in entering a summary judgment against you or the basis of a record which you say was not complete, but a record which, nevertheless, established that the exclusion or the pre-emption, if it occurred here, by reason of the tie-in, was not a pre-emption of the total financial market, but only a pre-emption of that portion of the financial market which was available to you for the purpose of obtaining loans on these peculiarly advantageous conditions.

A Well ---

Q I am trying not to state this invidiously so far as either side is concerned, but it seems to me that that is the issue.

A I am not trying to evade answering you. To me the case is a situation where at least the question exists, was there sufficient evidence on these elements of the tie-in arrangement either to create an issue of fact for a jury to try or even go beyond that and my own feeling is that the evidence is ---

Q What I ask you is, is the dispositive issue of fact that is before us a question whether -- well, it is dispositive of law before us, depends upon whether we believe that you can establish your case by showing merely this qualified partial pre-emption of the market that I have described.

That is to say, pre-emption of the market of funds, of available funds, available to you under these peculiarly favorable terms.

A Well, I didn't -- to me I am accustomed in these tie-in cases to thinking of pre-emption of the market in terms of the tied product and not of the tie-in element.

To me International Salt, Northern Pacific, Loew's, and the recent Perma Life Muffler case all teach that some economic power must exist over the tying element to enable

it to have the force of a lever for the purpose of creating the tied situation.

My point is that in this case the evidence on the unique character of these loans on these terms satisfies that basic requirement.

Q You could have gone elsewhere and obtained a loan on -- but not on such favorable conditions; is that right?

A That is correct, Your Honor.

Q You could have gone elsewhere and obtained prefabricated houses or could have built conventional houses; is that correct?

A Before we signed the loan agreement, yes, sir.

Q Yes.

It is a question of whether the putting together of these constituted an unreasonable restraint of trade under Section 1.

A Yes, sir.

Q Or satisfied, perhaps, the stricter standards of our tie-in cases.

A That is correct, sir.

Q The issue then is whether there was here the kind of market pre-emption or foreclosure of loan funds available on these peculiarly advantageous terms, whether that kind of pre-emption or foreclosure constitutes a violation of Section 1

when it was coupled with the tie-in arrangement for the pre-fabricated houses. Am I getting closer to the target now?

A I really think that Your Honor is addressing this in terms of the money being the tied element instead of the tying element. The tying element is the money. The money was the thing that was attractive. On its terms the money was the thing that attractive about this transaction.

Q In order to get that money you had to take along with it the U. S. Steel houses.

A That is correct.

Q And this is, therefore, exactly the opposite from a case that I seem to remember, maybe it was a consent decree, where a person when he bought a General Motors Car, and I am not even sure it was General Motors, had to go to the General Motors Finance Corporation to get the money.

This is exactly the opposite.

A This is the opposite of that case in that that is the U. S. v General Motors and I believe we cited that in our brief. In that case, the tying or the financing was the tied element.

Q The tied element. They wanted to make a profit out of the loan.

A That is correct, sir.

Q But the court below held that funds were available to you elsewhere, except that they were not available

on these terms and conditions.

A Yes, sir.

Q So the question is whether the foreclosure of the availability of funds on these specially favorable terms and conditions satisfies the requirements of our tie-in cases.

A I cannot agree with Your Honor's language. If you were talking about the prefabricated houses, which is the tying element, one of the questions is, is there not a substantial amount of interstate commerce involved as far as the tied element is concerned, which are the houses.

Here we have, I think the record shows clearly, a substantial amount of money to meet that test. As far as the financing is concerned, it seems to me that the question is not whether other people were foreclosed as far as that element is concerned, but whether by cause of the peculiar terms and conditions, this could be used in the marketplace as a lever to require the tie-in, in other words, the purchase of the prefabricated houses.

To me, this case is very parallel to the Perma Life Mufflers case where this Court very recently held that there was a case to try on facts, to me, which are not as appealing as ours, because there those people made all sorts of money out of their franchises.

They accepted,because they were advantageous to them in the business community, these franchises. Whereas, in our

case, the tremendous loss has occurred and no opportunity to be relieved of the restrictive agreement.

So, I feel that our case actually is a stronger case than the Perma Life Mufflers case, in which this Court said, there is evidence of a conspiracy to restrain trade here under Section 1 of the Sherman Act and that the case should be sent back for trial.

They attempted, at the last minute, to raise it and the District Judge did not allow their amended to be filed. This is, in effect, what has happened to us in the District Court, though, Your Honor, and in the 6th Circuit Court of Appeals.

Q Did you include the Clayton Act in this at all? I can't ---

A No, sir, I didn't. I didn't for one very simple reason. To me, the Clayton Act speaks specifically in terms of goods and wares. I have not found a case where the Clayton Act had been applied to a financing, to loans of money; so rather than -- I felt that I had a clear case under Section 1 of the Sherman Act.

So, I didn't befuddle the record by putting Section 3 of the Clayton into the case.

Q Tell me, what is the trade restrained here. It is houses; isn't it?

A Yes, sir.

Q What kind of houses?

A Prefabricated houses.

Q Just prefabricated?

A Yes, sir.

They build a package. They make a ---

Q I am familiar with that. I was interested in precisely what the market was that you said was restrained here by this practice.

A As far as the tie-in situation is concerned, of course, we really don't need to have a market. But, the closest market is Louisville, Jefferson County and surrounding areas.

I think the evidence shows that it goes far beyond that and covers the whole market area.

Q Doesn't there have to be a restraint of trade here in the housing market?

A Yes, sir.

Q Or in the prefabricated ---

A I believe there is.

Q And the restraint amounts to pre-empting some 57 acres of land, is it?

A No, sir. That is what people have talked about all along ---

Q This is the only land that these particular contracts which your client entered into affected.

A This is the land which was affected. We are talking about approximately $700,000 worth of prefabricated homes.

Q Exactly, exactly, yes.

A The homes are the tied product, not the land. Land is, as far as I am concerned, incidentally restrained by this but,also, if the houses, the interstate commerce in the houses is what ---

Q Incidentally, you said awhile ago that you could not have paid off this loan?

A Your Honor ---

Q I mean that the ---

A The reputation of the subdivision had gotten so bad that by the time ---

Q The lender refused you permission to pay off the loan?

A The lender refused us permission to build conventional homes in the subdivision so we could pay them off, yes, sir.

Q The District Court said that anytime plaintiff could have liquidated the debt to Defendant Credit Corporation and be relieved from all obligation to it, including the restriction on the 55-acres.

A I dispute the District Court's conclusion on that point on the basis of the language that I read to the

Court at the beginning of my argument from the loan agreement, which gives them the right to take possession of our property.

But this is the same as in International Salt; they could have canceled the leases and walked away. We could have possibly paid these people off, but I feel that the record shows that because of the bad reputation that this subdivision had gotten that it would have been impossible to have gone out and borrowed the money at that point from anybody else to pay them off in a lump sum.

We could and were ready, willing and able to pay these people off on a lot by lot basis as we built conventional homes on them and they wouldn't let us do it.

Q You say they were engaged in the lending business in a way that affected interstate commerce.

A Yes, sir.

Q They agreed to lend to you, but they imposed on you terms of having to get prefabricated houses in order to have the loan?

A That is correct, sir.

Q Is that your whole issue?

A Sir?

Q Is that the entire issue?

A That is the issue ---

Q You claim that you were denied the opportunity to present evidence to show which factor.

A We were denied the opportunity to have a trial before a jury of these issues, Your Honor, these issues which I have ---

Q You say the Court tried the issues themselves without letting you try it before the jury?

A No, sir. The Court entered a summary judgment.

Q I understand that.

A He asked ---

Q And he tried some issues.

A Well, he heard argument on some issues, then the respondent said his request prepared, what he called and what they called, findings of fact and conclusions of law.

Q Yes.

A And they were tendered to the Court.

Q Which you claim should have been done by the jury.

A Yes, sir.

Q And that there were disputed questionf of fact.

A Yes, sir.

Q And he decided them on the affidavit method.

A That is correct, sir.

Q I thought the Court's decision was that,granting everything that you relied on, on which there is no dispute really, that as a matter of law, there was no legal tie-in arrangement; isn't that what he held?

A I believe that anytime a court signs a document called "Summary Judgment" that that is supposed to be what the court is intending to do

As counsel for the respondents point out, even in their brief, it is obvious from reading the court's memorandum opinion, which is really these findings and fact and conclusions of law with the name changed, that erroneous grounds were relied on by the court all the way through.

As a matter of fact, really, the District Judge sort of threw up his hands and said: "I don't see how financing, even if it is unique, can be a tie-in."

That is what is in his memorandum because he didn't write the memorandum. But that is the basis on which the case was dismissed.

To me, it is clearly wrong. We were clearly entitled to a trial in this case.

Q If you assume -- I guess your argument is -- if you assume these were very favorable terms, very desirable, he had no power -- the judge -- had no power or right to determine the issue of issues of fact that he did, without your being allowed to introduce more.

You deny, as I understand it -- you assert that there could have been facts introduced which would have shown that you were entitled to a trial.

A Your Honor, it is my position that the record,

as it stands now, is sufficient to at least create issues of fact of the varying elements of the tie-in arrangement. If not, ---

Q Why did he make findings of fact if they were not essential to his judgment?

A I don't know, Your Honor; I pointed out to the Court ---

Q They were essential, weren't they?

A No, sir.

Q The findings of fact?

A Nowhere under the Federal rules on the summary judgment do you simply enter a judgment saying the complaint is dismissed.

Q Yes, but if it is going to be rested on facts as to what the facts were, I guess it had to be found that these were the facts.

A Except that all the facts in his memorandum opinion, Your Honor, are the facts relied on by the respondents.

Q You claim that those facts and those inferences drawn from them should have been determined by a jury and not by the judge.

A Yes, sir, exactly.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Flinn.

ORAL ARGUMENT OF MacDONALD FLINN, ESQ.

ON BEHALF OF RESPONDENTS

MR. FLINN; Mr. Chief Justice, may it please the Court:

Subject to the wishes of the Court, I plan to devote the bulk of my argument today to what we conceive to be the central legal issue in this case.

That issue turns upon the first of the two elements requisite the proof of a Sherman Act time violation.

Specifically, the question raised is this: If the Court,drawing every reasonable inference in favor of the plaintiff, concludes that the evidence shows that defendants' financing of the plaintiffs was on more favorable terms than were available from any other source, does that fact standing by itself establish the requisite sufficient economic power over the tying element to appreciably restrain trade in the tied product, here, prefabricated homes.

First, I would like to touch briefly upon the facts and two subsidiary issues. The plaintiff has argued that summary judgment was in appropriate. But, discovery was full and complete;to my knowlege there was never any claim by plaintiff that additional facts needed to be put into the record. There was never any request,when the defendant summary judgment motion was filed, for additional time to prepare affidavits or otherwise come forward with the showing that

Rule 56-E requires that there is evidence on material facts in dispute.

In addition, the plaintiff has advised this Court, as it did the court below, that all of the evidence essential to its case is in the record now before the Court.

On that record ---

Q I gather that they argue that these inferences drawn on by the court from that were not enough.

A Mr. Justice, we urge this Court to draw its own inference and I am sure that the Court will draw those inferences fully in favor of the plaintiff.

We recognize that that is the burden upon us. We welcome it. On this record ---

Q There are conflicts of fact here. There are conflicts in judgment as to market, I suppose, but the issue may be whether, assuming all of the facts to be as the plaintiff urges them to be, his most ambitious statement of the facts, if you will, making that assumption, has the plaintiff stated a cause of action that would entitle him to recover under Section 1 of the Clayton Act.

A Sherman Act, sir.

Q Of the Sherman Act, I mean. And I take it from reading the opinion of the District Court, which was adopted, as I remember, by the Court of Appeals; is that right?

A Mr. Justice, there was a percuriam affirments

by the Court of Appeals.

Q All right. That by reading of the opinion of the District Court, I take it that the District Court concluded that making that assumption, everything that plaintiff contends for to be established, that still does not constitute, as matter of law, violation of Section 1.

A I believe that is a fair interpretation.

Q Now why don't you tell us as succinctly as you can the reason for the District Court's legal conclusion.

A Very well, Your Honor, and I would say,before attempting to answer this question, we do urge that,regardless of the basis for the District Court's decision in reliance upon Helvering and Gowron and the unbroken line of precedents, in a summary judgment situation, such as is urged here, where only questions of law are presented to the reviewing court, both the Court of Appeals and this Court, whether or not the grounds stated by the District Court were right or leave doubt or are ambiguous, this Court is as fully able as the District Court was to reach the purely legal conclusions that are necessary in these circumstances.

In essence, I think the one aspect of the District Court decision, which plaintiff has most frequently pointed to as suggesting that there was a misconception on the part of the District Judge, as to what was requisite to establishe cause of action for tie-in violation under Section 1 whether

embellished or not under Section 2, conspiracy to monopolize charge, was the District Court's reference to the amount of land that was affected by the arrangements between these parties in comparison with the total land that was available in Louisville, Kentucky for house development.

I would urge that, clearly, that market fact by itself should not be determinative in a tie-in situation. I would urge equally strong, however, that that fact is not, clearly, irrelevant to the facts of these cases, where the tying arrangement is one between, if you will, a raw material supplier and his dealer, a middle man, who is taking the houses and then making them available to the ultimate consumers, the house residents.

I submit that in terms of a full analysis of this kind of a tie-in arrangement, it is appropriate to look to the question where other prefabricated house manufacturers were the sellers of conventional house building materials in any significant way, excluded from the market whether it is confined to Louisville, Kentucky or more broadly.

Now, if I may try to articulate our position so that the Court understands clearly why we urge that summary judgment is appropriate on this case, I will proceed.

Q Suppose the First National Bank of Louisville had been making him a loan and they required that he, to get the loan, had to use prefabricated material to build on these

houses; would that have violated the law?

A I woule urge not, Your Honor.

Q Well, that is what I supposed.

A In no way.

Q You are going to argue both the monopolization theory as well as the tie-in; are you?

A I am going to urge, Mr. Justice, that the monopolization theory, as I understand it to be stated in the petition and the plaintiff's main brief before this Court, is not properly before this Court.

Q But assuming that we should disagree with you on that, are you going to argue the merits of ---

A I am going to argue very simply and succinctly, Mr. Justice, that this record is barren of requisite evidence to establish the elements of a conspiracy to monopolize, specific intent, the relevant market; I believe that your decision in Walker Process, three terms ago, indicate that an attempt or a conspiracy to monopolize,the relevant market is in issue.

As I believe Mr. Justice Brennan's question suggests correctly, there would be a most substantial question in this case as to whether the market can be limited to prefabricated houses or whether the element of cross-elasticity of demand does not bring conventional houses into the market.

Now, that, in essence, is my argument on the conspiracy

to monopolize, apart from my principal argument that the kind of conspiracy to monopolize, which I understand the plaintiff to be urging now, was never urged before either the District Court or the Court of Appeals.

Now, back to the summary judgment, if I may; we urge the Court and we know that it will, and should, reach its own determination as to what the reasonable inferences to be drawn from this record are.

We submit that plaintiff has not shown any fact material to its anti-trust claim to be in dispute, to require resolution by a jury, whether in terms of witness credibility, conflicting evidence or otherwise.

In fact, the plaintiff has claimed continuously, ineed, in his main brief to this Court that on this record it is entitled to a directed verdict. Now, in those circumstances, I submit, that there can be no question but that summary judgment is appropriate.

The question is, what ---

Q However, that may be. To establish the plaintiff's case, he has got to show, according to our cases, monopoly power or at least a very high degree of economic control in the market for the tying service. The tying factor here being the loan.

A Financing, yes, sir.

Q And he has got to show that the tie-in results

in a substantial restrain upon competition in the market for the tied article. The tied article being the prefabricated house; right.

A Yes, Mr. Justice.

Q Now, as I read the opinion of the court below, and perhaps I am wrong, the court below said that he had not shown either of those; is that right or wrong.

A I believe that is right.

Q And the question is whether that conclusion made the case appropriate for summary judgment or whether the plaintiff was entitled to submit disputed questions of fact to a jury, have a jury decide on those elements.

A If there were any disputed issues of fact, yes, Mr. Justice.

Q All right.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 12 Noon the argument in the above-entitled matter recessed, to reconvene at 12:30 p.m. the same day.

P R O C E E D I N G S

(The argument in the above entitled matter was resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. Flinn, you may continue your argument.

MR. FLINN: Mr. Chief Justice, may it please the court, if I may very briefly return to and dispose of my argument in connection with this summary judgment question, I would like to briefly state some considerations which I hope will assist the court, and in any event, clear the defendants' position.

At most we have differed with the plaintiff only as to some of its characterizations of the evidence. In our brief we have tried to set forth the evidence of record cited by the plaintiff essentially verbatim from the record and have compared it with certain characterizations by the plaintiff.

I think that clearly the most, perhaps the only, significant area where we differ with the plaintiff's characterizations is in the connection with the evidence relied upon by the plaintiff to establish its claim that the defendant's financing extended to the plaintiffs was on more favorable terms than available from any other source, including our competitors, other pre-fabricated manufacturers.

In the final analysis, that determination is for

the court, and for the court alone, and we expect the court to draw every reasonable inference in favor of the plaintiff.

Q Let's assume for the moment there was no argument whatsoever, which I take it is certainly the core of your argument that there is no dispute about historical facts in the sense of who did what to whom, or things like that, but if there had been a jury trial, what question would have gone to the jury?

A Mr. Justice White, I would --

Q Wouldn't that have been just historical facts?

A Mr. Justice White, I would answer that question by saying that I think upon the plaintiff's own characterization of the record, i.e., that it is a record that entitles it to a directive verdict, it is quite possible that after a trial with a jury sitting and hearing the evidence there would have been no submission to the jury; that the court would have direct --

Q You have to say definitely that there wouldn't have been any submission, don't you?

A Yes, sir. I am prepared to say that.

Q Don't you have to say that?

A I do say it.

Q You say there could have been no other conclusion?

A That in essence is my argument, Mr. Justice,

because we are prepared to accept any inferences that the plaintiffs can reasonably argue from this record and they have told us, and they have told the court, that the record is complete and, indeed today, I believe the plaintiffs' counsel has advised the court that at most any other evidence that he would have put on would have been cummulative of what is now in this record before the court.

Now, for the balance of my argument I shall assume arguendo the plaintiffs' claim that the defendant's financing was extended on more favorable terms than available elsewhere is the fair inference and is the inference that this court will draw, because as I am trying to make clear, we, in no way, dispute the evidence and we will accept whatever the court concludes are the reasonable inferences from that evidence.

I would like to point only to one aspect of this record and ask the court particularly to notice nowhere is there any evidence that the plaintiff objected to the defendant's houses, or in any way found them burdensome or non-competitive at the time these arrangements were negotiated and entered into.

Similarly, there is no evidence that the plaintiff would have bought houses or building materials from any other source absent the financing that was made available to it by the defendants.

Q You are assuming then that the uniqueness of the loan satisfied the first prong of the tying ---

A I am assuming, Mr. Justice, that the loan was offered, the commitment was made on more favorable terms than were available elsewhere to this plaintiff.

Q Namely --

A I will argue that that is not the uniqueness within the sense of per se doctrine spelled out --

Q You mean that doesn't show the crucial economic power in the tying process.

A Exactly, exactly. It does not permit such an inference, Mr. Justice.

Q But even if it did, I take it you are arguing you should win, because of the lack of effect on the --

A That would be a second prong to my argument. I think honestly, Mr. Justice, the more significant argument is that the claim that a tying element involves sufficient economic power appreciably to restrain --

Q Then you do have to contend with Loew's --

A Definitely.

Q -- showing, "...the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

A Clearly Mr. Justice, I must face up to that case. Now, to dispose of what I believe is the last

subsidiary issue, this question of the conspiracy to monopolize, our position is very simple. We admit that the plaintiff has always alleged and argued a conspiracy to monopolize in violation of Section 2.

The point we make is very simple: Before both courts below, and indeed we think on a fair reading of plaintiffs' brief before this court, it has always urged that that conspiracy, indeed its entire case, turned upon the existence of a per se tying violation either as the objective or the means of effecting the violations of both, Sections 1 and 2, to the extent that the plaintiffs' brief -- and I am still uncertain after listening to counsel's argument today-- but to the extent that plaintiffs' brief argues before this court that its conspiracy to monopolize does not turn upon, does not require proof of a per se tying violation, that was an argument never presented in the courts below.

Now, turning to this --

Q Do you think the statement I read to you out of Loew's was a holding -- or is there any case that holds that?

A Mr. Justice, my view of Loew's is that honestly I don't know exactly what the court meant when it used the term "unique" there. I would like to discuss that case in considerable detail, as well as its place against the background of all of this court's significant tie-in rule cases.

Now, let's again come back --

Q I suppose that is a question we can resolve.

A No question about that Mr. Justice. If I can be of any assistance, it would be the only reason for my offering argument.

To come back to the central contention by the plaintiff, it is very simple. It claims that because the financing extended by defendant require the plaintiff to place no equity into the land portion of the loan commitment, which was something less than 15 percent of the total commitment extended by the defendants, this was more favorable and available from any other source and, therefore, in the meaning of the Loew's case, was unique and consequently, establishes the requisite of sufficient economic power over the tying element.

Our contention very simply is that as a matter of logic supported by the decisions of this court, you cannot infer simply from the fact that the tying element is offered on more favorable terms than available elsewhere that there is economic power in that tying element.

Now, coming Mr. Justice White to the Loew's decision, as this court knows, it involved the block booking of copyright movie films. It held that the requisite economic power over the tying element is presumed when the tying element is either patented or copyrighted.

Moreover, as the court well knows, the tying products there were frequently forced upon unwilling purchasers.

Now, outside the patent and copyright areas, I urge that the court has not defined "uniqueness" and I concede my inability to tell this court what it meant when it used the term "unique" in the Loew's case.

I would urge, however, to the extent that it coupled with that a reference to desirability to consumers, I think that this must as a matter of common sense been intended by the court to mean something more than desirable in the sense that one consumer buys 10 cents worth of the tying element. That would establish sufficient economic power in practically every product sold. I think the court meant something in terms of some indicium of meaningful economic power.

Indeed, the court has never merely assumed the existence of economic power. And I would point to the other significant tying decisions of the court.

Times-Picayune examined market share. And it was held there that 40 percent was not a dominant position when the other two sellers each had 30 percent of the relevant market.

Now, in Northern Pacific the court found substantial economic power over the tying land on a combination of factors. Specifically, extensive land holdings of the defendant there.

Secondly, the strategic location of land.

Third, the land was frequently essential to the businesses of the buyers and lessees who were subjected to the tie-in conditions.

Fourth, the host of tying arrangements affected by the defendant without any reasonable explanation for the existence of the restraint.

And finally, this court concluded that the defendant's purpose there obviously was to fence out competitors and the nature of the tie was that the fencing out would be for an indefinite period of time. It was the sale of land with the covenant running with the land indefinitely. Leases of long terms.

Now, concededly there may be cases where economic power over the tying element can be inferred indirectly from proof that the buyers were economically coerced to accept knowingly an inferior, burdensome, non-competitive tie product.

Pointing back to the facts, or the absence of facts, that I tried to bring to the court's attention a moment ago, here in this case there is no evidence that the plaintiff considered the defendant's houses the tie product to be of this character when it negotiated the arrangements now challeneged.

Consequently, we urge this is not a case of economic

coercion.

Q It is a case of economic coercion with respect to the tying product of financing. What petitioner represents is true that it was only by virtue of obtaining this loan favorable on these uniquely favorable terms that petitioner was able to go ahead with its business of constructing the houses.

So that in that sense, there was economic coercion. The question is whether that was the kind of economic coercion or the degree or extent of economic coercion that satisfies the requirements of our tying in cases. It is not a copyrighted product, perhaps it does not have elements of uniqueness in the same sense that a motion picture film has, but the petitioner argues that it was essential to its conduct of its business.

I suppose petitioner might say it is like Northern Pacific.

A Mr. Justice, I think perhaps you and I differ with all due respect somewhat in our semantic use of the phrase "economic coercion". I am using economic coercion in the sense of Mr. Justice Harlan's dissenting opinion in the Northern Pacific case.

Economic coercion in a tying context where a fair inference of economic power over the tying element can be drawn from the fact that it is obvious from the arrangement

that the buyer has had forced upon him something that he either cannot use, doesn't want, or is non-competitive and therefore --

Q Is it the submission here that the petitioner says he should have been allowed to present to a jury?

A My point Mr. Justice is he never made that contention until months after the arrangement had been entered into, until months after he had come back for a second helping of more of the same kind of financing.

So his frame of mind, which I believe --

Q Is this pari delicto?

A No, sir, it is not. It is an assertion, if your Honor will, that one element which may have to be looked at in reaching a conclusion as to economic power over the tying element is what was the state of mind of the buyer at the time he entered into this.

Q That sounds like a statement on your part that would be a most regretable error, a mistake in judgment, for the jury to decide that this is economic coercion. That doesn't get you very far.

A My argument Mr. Justice is that the economic coercion if it arises in a tying case exists at the time the parties affectuate the arrangements between them. It is only in terms of the buyer's state of mind at that time that you can ascertain whether or not there was economic coercion.

Now, to go on with the question. It seems to me if your question fairly states the plaintiff's position that he could not have gotten into the building business through any other financing means but for the more favorable terms obtained from the defendants, then the case is disposed of automatically without getting into the question of sufficient economic power. It follows that there was no foreclosure of competition. This plaintiff would have been unable to buy any competitor's pre-fabricated houses, any competitor's conventional house building material.

Now, we fully recognize that this court approaches tying arrangements, quite properly so, with suspicion. Indeed, the court has repeatedly said that they serve hardly any purpose beyond the suppression of competition.

At the same time, even under the more easily established standards of Section 3 of the Clayton Act, the court has recognized that tying arrangements are not inevitably anti-competitive. And without going into the details, we respectfully refer court to the Sinclair Refining Case, which was cited in some detail in our brief.

We urge where tying product is claimed to be unique, solely because it is offered at a lower price or on more favorable terms, it cannot logically be inferred from that fact standing alone, that sufficient economic power over the tying element to constitute a per se violation.

I would ask the court to consider the following few examples: A buyer may take a tying product as the condition to paying a lower price for the tying product simply because he considers the package to offer the best available terms for the combination of products he wants, not because the seller has economic power over the tying element or because the buyer is coercised to take a tied product that he doesn't want.

Indeed, the fact that the tying product must be offered on more favorable terms may suggest that it lacks even competitive parity in the market for the tying product.

Further, even a seller with no economic power may use a tying product as a loss leader to promote the sale of the tied product. By selling the tying product at a loss in effect he reduces the price of the tied product he is selling.

Now, we respectfully submit that in Northern Pacific this court appears to have recognized that offering the tying product on more favorable terms may imply the absence of economic power. Specifically, the majority opinion there appears to have given weight to the fact that the defendant there made no claim that the tying land came any cheaper than if the tying condition had not been imposed.

My time is about to expire. We ask the court to consider the particular nature of the tying element involved here. Financing, a commitment to lend money, credit.

If this case has any significance for others than the parties to it, it is most likely in connection with this aspect of the case. Dealer financing by sellers upon the condition that the seller's goods be purchased is wide-spread in the business community. Indeed, we argue that it is inevitable because every sale on credit involves a tie-in. Financing by the seller upon the condition that the buyer purchase the seller's goods.

Unless the seller either increases his price for his goods, or recovers in the form of interest the full cost of his forgoing receipt of the funds, he has reduced the price of his goods.

If the seller offers credit or financing on more favorable terms than available elsewhere, to that extent he has also reduced the price of his goods.

We submit that such financing unique because offered on more favorable terms than available elsewhere is price competition in the goods sold. As such, the financing challenged by the plaintiff here was an integral element of the price of the defendant's pre-fabricated houses.

For all of these reasons we submit that the judgment below should be reaffirmed.

If the court has no further questions, I shall conclude, Mr. Chief Justice.

(Whereupon, at 12:50 p.m., the argument in the above-entitled matter was concluded.)